IN THE HIGH COURT OF JUDICATURE AT BOMBAY

IN INSOLVENCY

NOTICE OF MOTION NO. 162 OF 2005

IN

NOTICE NO. N/176 OF 2005

Re: R.J. Sarvaiya and anr.
...Judgment Debtors

Ex-parte :

SICOM Ltd .....Judgment Creditors

NOTICE OF MOTION NO. 163 OF 2005

IN

NOTICE NO. N/176 OF 2005

Re: R.J. Sarvaiya and anr.
...Judgment Debtors

Ex-parte :

SICOM Ltd .....Judgment Creditors

Mr. Kishore Jain i/by. P.V.Shah
for judgment creditors.
Mr. M.K. Nesari for judgment debtors.

CORAM: S.U. KAMDAR, J.

DATED: 18TH APRIL, 2006.

P.C. :

1. The present Notice of Motion is taken out for setting aside the Insolvency notice No. N. 176 of 2005 dated 15.9.2005 and served on the judgment debtor on 20.9.2005.

2. The contention which has been raised by the judgment debtor in support of the aforesaid notice is that the claim as against the company known as Sereme Industries Ltd who is the principal debtor was the subject matter of proceedings pending before the BIFR and the BIFR has by an order dated 16.4.2003 granted permission to the judgment creditor to proceed with the suit but not to execute the final decree without permission of the board.

3. Pursuant to the said permission granted the judgment creditor has filed a suit and obtained a decree on 22.9.2003.

4. It is contended by the learned counsel for the judgment debtor that inview of the fact that the permission granted was qualified with the word

"that the decree should not be executed without prior permission of the board" and therefore the decree passed in the present case as against the judgment debtor who is one of the guarantor is not maintainable and the said notice is required to be set aside. The learned counsel for the judgment debtor has further contended that the provisions of Section 22 applies even to the guarantors and in view thereof the decree even if obtained with the permission of the board under Section 22 it must abide by the conditions which are imposed therein.

5. By an amendment of 1993 the words " no suit .....for the enforcement..... of any guarantee in respect of any loans or advance granted to the Industrial company" shall lie without the consent of the Board or the Appellate Authority has been inserted in Section 22 of the said Act. It has been thus submitted by the learned counsel for the judgment debtor that the provisions of Section 22 takes into its sweep the provisions of execution of a decree even as

against the guarantor and therefore there is a statutory bar from execution of the said decree. It has ben thus submitted that the motion should be made absolute.

6. In so far as the aforesaid contention is concerned the issue is no more a res-integra. The learned single judge of this court has in the case of Re: P.S. Shrinivasan Ex-Parte: Mukesh Babu Financial Services Ltd reported in 2001(4) B.C.R. 759 held that in so far as the guarantors are concerned the protection is only from institution of the suit and from prosecuting the suit and not against the execution of the decree.

7. In my opinion in the light of the judgment of the single judge of this court and also on plain reading of Section 22 I am of the view that as far as the stay of execution of the decree is concerned by virtue of the fact that amendment is giving limited protection to the guarantor there is no bar against the execution of the decree as

against the guarantor. The legislature by an amendment has conferred a limited protection to the guarantors which is only inrespect of institution of the suit for recovery of money except with the consent of the board. In that light of the matter it is not possible to accept the contention of the learned counsel for the judgment debtor that because of the condition imposed by the board while permitting the institution of the proceedings against the principal debtor i.e. the company, it will automatically also apply to the case of guarantor and therefore the decree is not executable and consequently notice is invalid in law cannot be accepted. In that light of the matter there is no merit in the motion. Motion dismissed accordingly.

8. The aforesaid view is also supported by the recent judgment of the apex court in the case of Kailashnath Agrawal vs. Pradeshiya Industries and Inv. Corp. of U.P. and anr. reported in AIR 2003 S.C. 1886 and particularly paras 3 and 5

which reads as under :

> "3. On 1.12.1997 the company was declared sick by the Board for Industrial and Financial Reconstruction (BIFR) in terms of Section 3(1) of the SICA. The BIFR appointed IFCI as the operating agency under Section 17(3) of the Act "to examine the viability and submit its report for revival of the company. While the proceedings before the BIFR were pending, on 6th February 2002 there separate notices of demand were served on the appellants as personal guarantors inrespect of the loans granted to the company by PICUP. The total amount claimed was Rs. 8,90,84,259.06p. Each of the appellants was called upon to pay the demand within 30 days alongwith the interest at the rates specified in the notice failing which PICUP said that it would take legal measures to recover its outstanding dues from each guarantor. The appellants replied to the notice stating that because of the decisions of this court on the scope of Section 22(1) of the Act, PICUP could not enforce its demand against the appellants. PICUP rejected the stand of the appellants and called upon the appellants to liquidate its dues failing which recovery certificates would be issued against the appellant.
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> "5. The submission of the appellant is that Section 22(1) of SICA specifically prohibited the filing of a suit for the recovery of the money for the enforcement of any guarantee inrespect of any loan or advance granted to an industrial company. Reliance has been placed on Maharashtra Tubes Ltd v. S.I.I. Corpn. of Maharashtra, 1993(2) SCC 144; Kanhaiyalal

Vishindas Gidwani v. Arun Dattatray Mehta, 2001(1) SCC 78; LIC v. Escorts Ltd., 1986(1) SCC 264; P.L. Kantha Rao vs. State of A.P. 1995(2) SCC 471; Ghantesher Ghosh v. Madan Mohan Ghose, 1996(11) SCC Shantibair Ghatge, 1989 Supp (2) SCC 627 to submit that the word 'suit' in Section 22(1) should be understood as including any proceeding including certificate proceedings for the enforcement of such a guarantee. "

9. As Notice of Motion No. 163 of 2005 is based on identical facts as that of Notice of Motion No. 162 of 2005 similar order passed in this motion also.

sd/-

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